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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Anthony R. Ramirez,
9 Plaintiff
10 -*vs*-
11 Unknown Hadsal, et al.,
12 Defendants.

CV-11-0737-PHX-GMS (JFM)

Order

13 Under consideration are Plaintiff's Motion to Reconsider Appointment of Counsel
14 (Doc. 30) and Motion for Continuance (Doc. 31), filed February 27, 2012. Although
15 briefing on the motions is not complete, the Court finds that further briefing is not
16 necessary to a fair adjudication of the motions.

17 **APPOINTMENT OF COUNSEL**

18 Plaintiff seeks appointment of counsel, citing as cause the breakdown of
19 settlement negotiations and anticipation of trial, and Plaintiff's *pro se* status with limited
20 legal resources available. (Although Plaintiff casts his motion as one for reconsideration,
21 the Court has not ruled on a request for counsel by Plaintiff, but merely observed that
22 none had been filed in this Court since removal from state court.)

23 Under the controlling law in the Ninth Circuit, neither the Constitution nor 28
24 U.S.C. § 1915(e)(1) justify appointment of counsel for Plaintiff.

25
26 **1. No Constitutional Right to Counsel**

27 Plaintiff establishes no constitutional right for an indigent to have appointed

1 counsel in a civil case. *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980) is the oft
2 cited authority in the Ninth Circuit for the polemic that there is no constitutional right to
3 counsel in a civil rights proceeding. However, *Aldabe* engaged in no analysis of Equal
4 Protection or any other constitutional mandate. Rather, the court simply noted that the
5 plaintiff "cites no authority supporting the existence of a constitutional right to counsel in
6 such a situation" and thus turned to 28 U.S.C. § 1915(d) to look for a basis for
7 appointment. Similarly, Plaintiff here offers no authority for a finding of such a
8 constitutional right.

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10 **2. Constitutional Right of Access to Courts Does Not Require Appointment**

11 Plaintiff is beyond the point in this case where Plaintiffs' "right of access" requires
12 appointment of counsel. It is established "beyond doubt" that prisoners have a
13 constitutional right of access to the courts, *Bounds v. Smith*, 430 U.S. 817, 821 (1977),
14 that is "adequate, effective, and meaningful." *Id.* at 822.

15 It is true that the "right of access" can require access to a law library. In *Bounds*,
16 the Court posed the question as "whether law libraries or other forms of legal assistance
17 are needed to give prisoners a reasonably adequate opportunity to present claimed
18 violations of fundamental constitutional rights to the courts." *Id.* at 825. The Court
19 noted that if the state files a response to a *pro se* pleading, "it will undoubtedly contain
20 seemingly authoritative citations" and without a library, an inmate will be unable to rebut
21 the state's argument. *Id.* at 826. The Court therefore held, "that the fundamental
22 constitutional right of access to the courts requires prison authorities to assist inmates in
23 the preparation and filing of meaningful legal papers by providing prisoners with
24 adequate law libraries or adequate assistance from persons trained in the law." *Id.* at
25 828.

1 However, "[i]nsofar as the right vindicated by Bounds is concerned,
2 'meaningful access to the courts is the touchstone', and the inmate must therefore
3 demonstrate that the alleged shortcomings in the library or legal assistance program
4 hindered his efforts to pursue a legal claim. *Lewis v. Casey*, 518 U.S. 343, 351 (1996)
5 (citations omitted). The Constitution does not require that prisoners be able to "conduct
6 generalized research, but only that they be able to present their grievances to the courts."
7
8 *Id.* at 360.

9 The Ninth Circuit has held that the constitutional right of access to the courts
10 requires that the state provide assistance only through the pleading stage, including
11 preparation of a reply to an answer, if the court orders a reply. *Cornett v. Donovan*, 51
12 F.3d 894, 899 (1995). This case is beyond the pleading stage and accordingly Plaintiff's
13 right of access is not at issue.
14

15 **3. Limited Discretion to "Request" Counsel under 28 U.S.C. § 1915(e)(1)**

16 28 U.S.C. § 1915(e)(1) confers on the court the discretion to "request" counsel to
17 represent an indigent civil litigant. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir.
18 1986); *Aldabe*, 616 F.2d at 1093. But this circuit has limited the exercise of that power
19 to "exceptional circumstances", based upon such factors as the likelihood of success on
20 the merits and the ability of the plaintiff to articulate his claims in light of their
21 complexity. *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990).

22 That standard seeks to identify which, among the thousands of prisoner civil
23 rights cases filed ever year, warrant the extraordinary remedy of providing counsel to a
24 party in a civil proceeding. The two key circumstances examined to identify such
25 exceptional cases, are the likelihood of success on the merits seeks to answer whether the
26 appointment is a worthwhile investment of resources, and complexity of the issues
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1 answers whether the investment is necessary.

2 Neither of these factors is dispositive and both must be viewed together before
3 reaching a decision on a request for counsel under section 1915(e)(1). *Wilborn*, 789 F.2d
4 at 1331.
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6 **Likelihood of Success:** Evaluating the likelihood of success of a matter based on
7 the pleadings and motions requires of necessity a good portion of speculation by the
8 Court. While the Court is certainly not in a position to "try the case," it must still predict
9 the likelihood that the Plaintiff will ultimately succeed in his suit based on the nature of
10 the claims and the defenses raised. Here, Plaintiff offers nothing to demonstrate a
11 likelihood of success on the merits.
12

13 Plaintiff's claims arise from the confiscation of his tinted glasses while confined
14 in the Maricopa County Jail. Plaintiff asserts Defendant confiscated the glasses in
15 retaliation for Plaintiff speaking with ACLU representatives, while allowing other
16 inmates with tinted glasses to retain them. Plaintiff's claims are for retaliation and
17 violation of equal protection. (Screening Order 5/27/11, Doc. 8.)
18

19 Defendants have asserted a denial of liability, arguing that the sunglasses were
20 confiscated pursuant to an established security policy and not in retaliation. (Joint
21 Discovery Planning Report, Doc. 22.)
22

23 Plaintiff's motion does nothing to counteract the pall that these defenses cast over
24 the prognosis for his case.
25

26 **Complexity:** In addition, Plaintiff has failed to show that any difficulty he is
27 experiencing in attempting to litigate this case is derived from the complexity of the
28 issues involved. While most actions, such as the instant case, require development of
supporting facts and legal authorities during litigation and a *pro se* litigant will seldom

1 be in a position to easily research the law and investigate and present at trial the facts to
2 support the case, a demonstration of the need to do so is not sufficient to establish
3 successfully the complexity of the relevant issues. *Wilborn*, 789 F.2d at 1331.
4 Moreover, such difficulties are not exceptional, but are present in virtually every *pro se*
5 prisoner civil right suit.
6

7 Accordingly, the motion will be denied.
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CONTINUANCE

10 Plaintiff's Motion for Continuance seeks a 60 day extension of all deadlines,
11 citing as cause the breakdown of settlement negotiations. Defendants have responded
12 voicing no opposition. (Doc. 32) While the Court does not wish to discourage
13 settlement negotiations, they are not of themselves a cause to reset the Court's schedule.
14 Moreover, Plaintiff offers nothing in particular to show that the time made available was
15 inadequate, or that the time remaining is unexpectedly inadequate.
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IT IS THEREFORE ORDERED that Plaintiff's Motion to Reconsider
18 Appointment of Counsel, filed February 27, 2012 (Doc. 30) is **DENIED WITHOUT**
19 **PREJUDICE.**

21 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Continuance, filed
22 February 27, 2012 (Doc. 31) is **DENIED**.
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24 Dated: February 28, 2012

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James F. Metcalf
United States Magistrate Judge